

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

THOMAS M. JAMES

Plaintiff,

v.

DOCTOR ELI LORENZO and
DOCTOR NICOLAS P. VILLANUSTRE

Defendants.

Case No.: 1:13-cv-541-WTL-TAB

**DOCTOR NICOLAS P. VILLANUSTRE'S MOTION TO DISMISS COMPLAINT
UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)**

COMES NOW, Nicolas P. Villanustre M.D. ("Defendant"), by counsel, and hereby requests that the Court dismiss Plaintiff Thomas M. James' ("Plaintiff") Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendant would show the court as follows:

1. Plaintiff's action against Defendant is an action in medical malpractice based upon alleged medical care that Plaintiff received from Defendant.

2. In Indiana, a plaintiff may only bring a medical malpractice action against a health care provider by first filing a Proposed Complaint ("Complaint") before the Department of Insurance and then having a decision rendered by a medical review panel.

3. On February 23, 2009, Plaintiff filed a medical malpractice Complaint with the Indiana Department of Insurance against Defendant and other providers. *See Exhibit A* -Plaintiff's Proposed Complaint.

4. Plaintiff filed the present Complaint in this Court on September 25, 2009.

5. The present Complaint filed in this Southern District Court of Indiana involves the same issues presently asserted against the Defendant in the Complaint that was filed by Plaintiff before the Department of Insurance on February 23, 2009.

6. A medical review panel had not rendered a decision on Plaintiff's medical malpractice Complaint at the time Plaintiff filed the present Complaint in this Court. Accordingly, this Court lacked subject matter jurisdiction over Plaintiff's Complaint at the time Plaintiff's Complaint was filed in this Court.

7. Moreover, on August 3, 2011, a State Court dismissed Plaintiff's medical malpractice Complaint filed on February 23, 2009 against Defendant and other providers, with prejudice. *See Exhibit B - State Court Dismissal.*

8. On October 5, 2011, the Court of Appeals in Indiana affirmed the trial court's order dismissing Plaintiff's Complaint, with prejudice. *See Exhibit C - Court of Appeals Order.*

9. Accordingly, Plaintiff's Complaint must be dismissed since this Court lacked subject matter jurisdiction over this Complaint at the time that it was filed. Furthermore, this Complaint must be dismissed because Plaintiff's action is barred under the doctrine of res judicata since the present action is an identical action against Defendant and involves the same issues that Plaintiff asserted in a state court action, which was dismissed.

WHEREFORE, Defendant Nicolas P. Villanustre, by counsel, respectfully requests the Court dismiss this action against Defendant and for all other proper relief in the premises.

Respectfully submitted,

/s/Gerald B. Coleman
Gerald B. Coleman, #16009-49
Coleman Stevenson & Montel, LLP
9101 Wesleyan Road, Suite 100
Indianapolis, Indiana 46268
Telephone: (317) 875-0400
Facsimile: (317) 802-0900
Email: gcoleman@csmllegal.com

*Attorney for Defendant Doctor
Nicolas P. Villanustre*

Before the Department of Insurance
State Of Indiana

Thomas M. James / 98106
Plaintiff(s)

vs.

GEO Group / Jeffery Wrights / CMS
medical (n.c.e.f.) / Dr. Eli (necf)
(Dr. John Doe) Wishard hospital
Defendant(s)

FILED

FEB 23 2009

STATE OF INDIANA
DEPT. OF INSURANCE

PROPOSED COMPLAINT FOR DAMAGES

Comes now the Plaintiff(s), Thomas M. James, AOC #98106, and
for his/her complaint for damages against the Defendant(s), states
as follows:

1. That Plaintiff Thomas M. James was a patient of the
Defendant(s), GEO Group (n.c.e.f.) at medical Dept. (C.M.S) at
Dr. Eli and Dr. John Doe at Wishard Hospital, from 10/27/07
through 1/10/07, and received medical care and/or treatment from
Defendant(s). (CMS) medical Dept. Dr. Eli and from Dr. John
Doe at Wishard hospital in Indianapolis, Indiana.

2. Said medical care or treatment rendered by Defendant(s) was
negligent and below the appropriate standard of care. Because Doctor's
failed to timely address the injury and failed to correct same in 10 weeks and over.

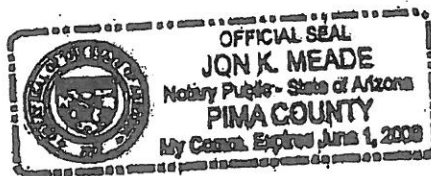
3. That as a proximate result of the negligence of the Defendant(s),
the plaintiff(s) Thomas M. James, has/have incurred medical
expenses, additional treatment, related expenses, lost wages and/or 'Life Threatening'
intangible damages of a nature as to require compensation. Superintendent -
Jeffery Wright is responsible for all compensatory damages.

WHEREFORE, the Plaintiff(s) respectfully pray(s) for an award against the
Defendant(s) in an amount that will fairly and fully compensate Plaintiff(s)
for all losses, injuries and damages, for the costs of this action, and for
all other just and proper relief.

EXHIBIT

A

Respectfully submitted,

Thomas M. JamesMARY F. JAMESPhone: (520)-408-8240Address: ASDC Tucson / Santa RitaDate: 2/5/2009P.O. Box 24006Tucson, Arizona, 85734Subscribed and Sworn to me: February 5th, 2009
Jon K. Meade
 Notary Public:

June 1, 2009
 My Commission Expires:

Thomas M. James
 Thomas M. James
 ADC #98106 / Claimant

Note: I, Thomas M. James, ADC #98106, never received the Final Notice dated on 2/5/2008 by the medical malpractice Division, from Stephanie mostly, Claims processor.

Thomas M. James
 98106

STATE OF INDIANA)
COUNTY OF MARION) SS:

IN THE MARION CIRCUIT COURT
CAUSE NO. 49C01-1105-CT-018677

COMMISSIONER OF THE INDIANA DEPARTMENT
OF INSURANCE,
Petitioner,

V.

THOMAS M. JAMES,
Respondent/Plaintiff

V.

GEO GROUP, JEFFREY WRIGGLES, CMS MEDICAL
(NCCCP), JOHN DOE, WISHARD HOSPITAL,
Defendants, Interested Non-Respondents.

FILED

161 AUG 03 2011

Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

ORDER OF DISMISSAL PURSUANT TO I.C. 34-18-8-8 AND TRIAL RULE 41(E)

Petitioner, by counsel, filed his Motion To Dismiss For Failure To Prosecute. Respondent/Plaintiff ("Respondent") was served with the Motion on or about May 20, 2011, and he has not responded thereto. Respondent having failed to show sufficient cause why his proposed complaint should not be dismissed with prejudice, Petitioner's Motion is granted.

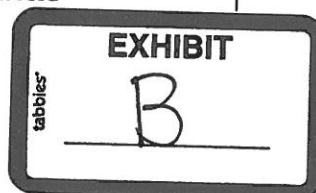
IT IS THEREFORE ORDERED, ADJUDGED AND DECIDED that Respondent's Proposed Complaint is hereby DISMISSED WITH PREJUDICE.

SO ORDERED this 3rd day of August, 2011:

Mark A. Jones
Mark A. Jones, Master Commissioner
RECOMMENDED FOR APPROVAL
APPROVED AND ORDERED
COMMISSIONER

Ravis Roubey

Distribution: Counsel of Record



Thomas M. James, #98106
Arizona State Prison
ASPC-Douglas, Mojave North
P.O. Box 5002
Douglas, AZ 85608

FILED
OCT - 5 2011
Harris

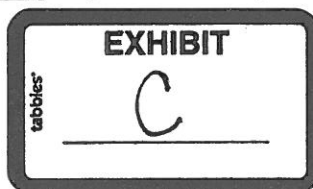
Appellee.

CAUSE NO. 33A05-1104-CT-238

The Notice of Completion of Transcript was due to be filed no later than June 24, 2011. Appellant has failed to timely seek an order to compel the issuance of the Notice of Completion of Transcript, and this appeal is subject to dismissal. See Ind. App. R. 10(G).

1. This appeal is DISMISSED WITH PREJUDICE.
2. The Clerk of this Court is directed to send copies of this order to the parties, the trial court, the Henry Circuit and Superior Courts Clerk.
3. The Henry Circuit and Superior Courts Clerk is directed to file a copy of this order under Lower Cause Number 33D01-1011-CT-14, and, pursuant to Indiana Trial Rule 77(D), the Clerk shall place the contents of this order in the Record of Judgments and Orders.

ORDERED this 5th day of October, 2011.



Margaret L. RAB
Chief Judge